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No. 84-1545

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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IN THE

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THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rules 36 and 42 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) moves this Court for leave to file the accompanying brief as amicus curiae supporting the Jurisdictional Statement of the Appellant, the Miller-Wohl Company, in this case. In support of this motion, EEAC shows as follows:

1. The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, which incorporates the Pregnancy Discrimination Act, as well as other federal and state statutes, orders, and regulations pertaining to nondiscriminatory employment practices. As such, these members are vitally concerned with the issue presented in this case; *i.e.*, whether a state statute mandating that women disabled by pregnancy, childbirth, or related conditions be given a benefit to which other disabled employees are not entitled conflicts with the federal Pregnancy Discrimination Act and therefore preempted by federal law.

3. The movant, EEAC, is concerned with the broader implications of this case. Particularly, we are concerned that affirmance of the Montana Supreme Court's decision would open the door for states to codify various types of preferential treatment for women affected by pregnancy. As shown in more detail in the attached brief, such state legislation would

almost inevitably clash with Title VII's requirement that employment benefits cannot be denied to employees on the basis of sex—here, male employees and non-pregnant female employees. Thus, compliance with such state pregnancy benefit statutes could render employers liable to other employees who are not entitled to the same benefits.

It has been suggested that employers could resolve this potential Title VII liability by voluntarily extending to all employees those benefits which state law requires only for pregnant employees. Such a suggestion, however, creates an improper infringement upon traditional business prerogatives and uses potential federal liability to force employers to adopt policies beyond even those chosen by the state legislature. Consequently, EEAC's members have a substantial interest in determining whether state laws in fact create a potential conflict with Title VII. If allowed to participate as amicus curiae, EEAC will demonstrate that the importance of these broader issues warrants that jurisdiction be noted and the case accepted for further briefing and argument. EEAC is uniquely qualified to do so, based upon its prior experience with these issues and as amicus curiae in cases raising related questions.

4. Because of its interest in issues pertaining to equal employment, EEAC on several other occasions has sought and been granted permission by the Court to file briefs as amicus curiae. *See, e.g., Cannon v. The University of Chicago, et al.*, 441 U.S. 677 (1979); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Gardner v. Westinghouse Broadcasting Company*, 437 U.S. 478 (1978); and *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977).

5. EEAC also has filed briefs as amicus curiae with the consent of the parties in a number of other cases raising important equal employment issues relating to pregnancy, gender classifications, the use of statistical evidence, and the relationship between state and federal non-discrimination law. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, —— U.S. ——, 103 S. Ct. 2622 (1983); *Shaw v. Delta Air Lines, Inc.*, —— U.S. ——, 103 S. Ct. 2890 (1983); *Arizona Governing Committee v. Norris*, —— U.S. ——, 103 S. Ct. 3492 (1983); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Alexander v. Choate*, —— U.S. ——, 105 S. Ct. 712 (1985); and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Furthermore, EEAC participated as amicus curiae in *California Federal Savings & Loan Association v. Guerra, et al.*, Nos. 84-5843, 84-5844, slip op. (9th Cir. April 16, 1985), a recent Ninth Circuit case addressing a question similar to that before the Court in this case.

6. The written consent of counsel for the appellant and appellee Tamara Buley to the filing of this brief will be filed with the Clerk of the Court. Counsel for appellee, the Commissioner of Labor of the State of Montana, has declined to consent to the filing of this brief, thereby necessitating this motion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1545

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE JURISDICTIONAL STATEMENT

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae contingent upon the granting of the attached motion. This brief urges that this case presents a substantial question and therefore should be accepted for further review and oral argument.

STATEMENT OF THE CASE

The Appellant, the Miller-Wohl Company, operates a chain of women's clothing stores located throughout the United States. On August 1, 1979, the Appellant hired Tamara Buley as a part-time sales clerk in its Great Falls, Montana store. During her

first month of employment, Ms. Buley was sick at work on several occasions and also missed work as a result of suffering from "morning sickness." Consequently, she was unable to perform the responsibilities of the job for which she was hired. Because Miller-Wohl's employment policy provides that an employee is not entitled to obtain a leave of absence for *any* sickness or maternity or to receive any paid sick leave for *any* illness until the end of the first year of employment, Miller-Wohl terminated Ms. Buley's employment.

After her discharge, Ms. Buley filed a complaint against Miller-Wohl with the Commissioner of Labor and Industry alleging a violation of the Montana Maternity Leave Act (MMLA). The Montana Maternity Leave Act provides in pertinent part, that "[i]t shall be unlawful for an employer or his agent to: 1) terminate a woman's employment because of her pregnancy; [or,] 2) refuse to grant the employee a reasonable leave of absence for such pregnancy . . ." Section 49-2-310, 311, MCA (1983).[1] The Commissioner found that the Appellant violated the MMLA, that the MMLA did not conflict with federal law and therefore it was not preempted by Title VII of the Civil Rights Act of 1964. The state district court,

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[1] Based upon an alleged conflict between the MMLA and Title VII, Appellant sought injunctive relief in federal court to prohibit the Commission from continuing its action against Miller-Wohl. The district court's order finding that there was no preemption of state law was vacated because there was no federal subject matter jurisdiction. See *Miller-Wohl Company v. Commission of Labor & Industry, State of Montana,* 515 F. Supp. 1264 (D. Mont. 1981), *action dismissed,* 685 F.2d 1088 (9th Cir. 1982).

however, reversed the decision of the Commissioner on the grounds that

> "the Maternity Leave Act is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring non-disabled pregnant employees to the discrimination of disabled/non-pregnant employees and disabled male employees, and is pre-empted by Titles VII and XI of the Federal Civil Rights Act."

(A. 3c).[2]

The case was appealed to the Montana Supreme Court which held:

* * * *

> 3) "Miller-Wohl's no leave policy created a disparate effect on women who become pregnant, compared to those employees who do not become pregnant. Although facially neutral, its no-leave policy subjected pregnant women to a job termination risk on a basis not faced by men. The no-leave policy therefore was sexually discriminatory in violation of Title VII and the Pregnancy Disability Act.

* * * *

> 5) Miller-Wohl's termination of Tamara directly violated the MMLA. The policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females. Its objective in that field, equality, is the same as the objective of Title VII. We do not agree that the MMLA violates Title VII because it is gender-based in its operation, in

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[2] "A." references are to the Appendices to the Jurisdictional Statement.

that it protects women without at the same time protecting others equally.

* * * *

8) We find the MMLA valid."

(A. 3b-4b).

THERE ARE SUBSTANTIAL REASONS FOR NOTING PROBABLE JURISDICTION OVER THIS APPEAL

I. STATE STATUTES MANDATING THAT WOMEN DISABLED BY PREGNANCY BE GIVEN BENEFITS TO WHICH OTHER DISABLED EMPLOYEES ARE NOT ENTITLED POTENTIALLY CONFLICT WITH TITLE VII OF THE CIVIL RIGHTS ACT, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT OF 1978.

A. This Case Has Important Implications Beyond The Particular Parties.

The Court's disposition of this case could have important ramifications beyond the particular Montana statute and employer. At issue is the authority of state governments to require that pregnant employees be granted employment benefits to which neither male nor female employees who are not pregnant but who also suffer from disabilities, are entitled to receive. The instant case involves a state statute that requires an employer to give a leave of absence to employees disabled by pregnancy even though the employer does not grant such leave to employees with other disabilities. Other states, moreover, have also enacted statutes which provide other employment preferences based on pregnancy.[3] Insofar as this Court is called

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[3] See Conn. Gen. Stat. § 46a-60(a)(7); Calif. Gov't Code § 12945(b)(2), which requires pregnancy leave for up to four months, upheld in *California Federal Savings & Loan Association v. Guerra, et al.*, Nos. 84-5843, 5844, slip op. (9th Cir. April 16, 1985).

upon in the instant case to determine whether these pregnancy-related preferences conflict with Title VII, the case raises important questions of federal employment policy and the appropriate relationship between the federal and state governments in regulating this area.

As shown more fully below, the state laws in question go beyond the federal Pregnancy Discrimination Act, in that the federal Act does not require that pregnant employees be treated any differently than other employees with respect to disability benefits or leave policies. It merely mandates that they receive the same treatment as other employees. At the same time, it is clear that Title VII forbids employers to treat other employees, including males, differently because of their sex. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, —— U.S. ——, 103 S. Ct. 2622 (1983), discussed more fully below at p. 9-10. Our concern, therefore, is that employers may face liability to groups of nonpregnant employees who are not entitled to receive the same employment benefits as are mandated for pregnant employees under these state laws. The federal district court and the Montana Supreme Court suggested that this dilemma could be resolved by the employer extending its policies to provide all employees with these same benefits.[4] This, however, is an improper infringe-

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[4] *Miller-Wohl Co. v. Commissioner*, 515 F. Supp. at 1267; (A. 25b-26b). It should be noted that it is extremely questionable whether the courts have the authority to usurp legislative prerogatives and extend to all employees benefits which the legislature has given only to one group. *See e.g., Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20, 22 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976); and *Burns v.*

ment upon business prerogatives and uses potential federal liability as a lever to force employers to adopt employment benefit policies beyond those even the state legislature has chosen to require. Further guidance by the Court, therefore, is needed at this time.

B. The Pregnancy Discrimination Act And Its Legislative History Strongly Indicate that All Employees Must Be Treated The "Same" According To Their Ability To Work And That Work Status Preferences May Not Be Given To Pregnant Employees.

The Pregnancy Discrimination Act, enacted in October 1978, was a congressional clarification of employment discrimination law with respect to pregnancy and pregnancy-related issues.[5] The Act, which amends Title VII, reads:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the *same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*, and nothing in Section 703(h)

Rohr Corp., 346 F. Supp. 994, 997 (S.D. Cal. 1972). *And see, California Brewers Ass'n. v. Bryant*, 444 U.S. 598 (1980) (Congress left it to employers and not the courts to establish employment conditions).

[5] Specifically, Congress intended to negate the Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Court stated that a disability insurance plan which excluded coverage for pregnancy related disabilities did not violate Title VII because a condition-related distinction was being made, not a gender-related distinction.

> of this title shall be interpreted to *permit* otherwise (emphasis added).

42 U.S.C. § 2000e(k).

In selecting this language, Congress intentionally specified that all employees should be treated the "*same*" on the basis of their ability or inability to work. The meaning of this language is clear. Pregnant women may be treated no differently—neither more beneficially nor more detrimentally—than any other workers who, for reasons other than pregnancy, are similarly situated in terms of their ability or inability to work.[6]

This construction of the Pregnancy Discrimination Act's plain language is supported by its legislative history. As stated by Senator Stafford on the Senate floor, "When an employer treats pregnancy, childbirth, and related conditions the same as he treats any other disabling condition, then he has complied with this bill." 123 Cong. Rec. 29645 (1977).

Although not discussed by the Court below, the legislative history is replete with evidence that Congress intended to permit only equal treatment. On numerous occasions, it was stated that there was nothing in the Act to mandate any additional treatment for women to accommodate their role as child bearers. In the Senate report submitted by Senator Williams, the legislation was explained as follows:

> the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue

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[6] Whenever a question of statutory construction arises, it is well-settled that the starting point must be the language used by Congress and it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used by Congress. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982), and cases cited therein.

> working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. *The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.*

S. Rep. No. 331, 95th Cong. 1st Sess. 4 (1977)

The House Report also reaffirms that the Congressional intent was to mandate only equal treatment.

> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter . . . . The bill would simply *require that pregnant women be treated the same as other employees on the basis of their ability or inability to work* . . . .
>
> The "same treatment" may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as *the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work* (emphasis added).

H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4752-4753.

C. The Court Should Review This Case To Resolve Apparent Conflicts With Prior Decisions Of This Court.

As construed by this Court, the Pregnancy Discrimination Act requires that all employees, male

and female, be treated the same and forbids sex-related benefit differentials. While the question whether a state statute granting preferential treatment to women disabled by pregnancy conflicts with Title VII is a novel question for the Court, this Court has previously recognized that an employment policy of an individual employer which provides special treatment for pregnant employees violates the Pregnancy Discrimination Act. In *Newport News Shipbuilding and Dry Dock Company v. EEOC*, —— U.S. ——, 103 S. Ct. 2622 (1983), the Court squarely addressed and rejected the assertion that it is appropriate under the PDA to accord preferential treatment to women employees disabled by pregnancy. The Court found that the employer had engaged in unlawful sex discrimination against its male employees by excluding pregnancy from the otherwise comprehensive medical benefits provided to employee spouses. Coverage for pregnancy was provided to female employees. In holding that the male employees had been discriminated against on the basis of sex because female employees received preferential treatment, the Court noted:

> Although the 1978 Act makes clear that this language [the general prohibition against sex discrimination at Section 703(a), 42 U.S.C. § 2000e-2(a)] should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which was already present in the Act. As we explain infra, . . . petitioner's plan discriminates against male employees on the basis of their sex.

103 S. Ct. at 2627, n.11.

The Court concluded:

> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of any employee's sex.
>
> * * * *
>
> The pregnancy limitation in this case violates Title VII by discriminating against male employees.

103 S. Ct. at 2631-2632.

The Court's decision unequivocally states that "[m]ale as well as female employees are protected against discrimination." *Id.* at 2630.

Newport News thus clearly interprets the Pregnancy Discrimination Act as prohibiting any distinction whatsoever made on the basis of pregnancy. Furthermore, the Court held that such a distinction is per se discrimination, regardless of whether the distinction creates a benefit or a detriment for women. If a distinction made on the basis of pregnancy provides women with an additional benefit, the distinction will be per se discrimination because it discriminates against men.

In *Arizona Governing Committee v. Norris*, —— U.S. ——, 103 S. Ct. 3429 (1983), this Court further clarified Title VII by holding that the statute prohibits making any distinctions whatsoever based on sex or sex related factors. In holding that it is unlawful for an employer to classify employees on the basis of sex in predicting longevity for purposes of calculating retirement benefits, the Court stated:

> "What we said in Manhart bears repeating: 'Congress has decided that classification based on

> sex, like those based on national origin or race are unlawful.' [Citation omitted]. The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute '[*e*]*ven a true generalization about* [*a*] *class*' *cannot justify class based treatment.* [footnote and citation omitted].

103 S. Ct. at 3498.

These decisions arguably would render employers liable to employees who are denied benefits that are given to pregnant employees.

The Montana legislature failed to grasp the dilemma created by these decisions and the legislative history of the Pregnancy Discrimination Act. It enacted legislation articulating specific accommodations which an employer must make for pregnant women, including granting them a reasonable leave of absence for such pregnancy when they are unable to work, even where such leave is not available to other disabled employees.

The question in this appeal is whether these two approaches can exist side-by-side. Can an employer comply with the state's mandate for preferential treatment for pregnant women while simultaneously complying with federal law which provides that all persons similar in their ability to work cannot be denied benefits for a sex-based reason?[7] A review of

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[7] The Ninth Circuit recently addressed the same question and found that the two approaches could exist side-by-side because Congress, in enacting the PDA, intended to "construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *California Federal Savings and Loan v. Guerra*, Nos. 84-5843, 84-

the Montana Supreme Court's decision reveals that that Court did not address this language in Title VII nor the relevant legislative history. Rather the Montana Supreme Court concluded that the Appellant violated Title VII; that the policy and the purpose of the MMLA are the same as the policy of Title VII; and that the MMLA was therefore valid.

While both statutes may have been enacted to prevent pregnancy discrimination, this common intent does not bring the state law in accordance with the federal law. The Pregnancy Discrimination Act did more than set out an objective of eliminating pregnancy discrimination; it set out specific guidelines for combatting the discrimination. Therefore, for state law to be in accordance with the Act it must not only have the same intent but also must follow the same guidelines. Consequently, the Montana Supreme Court's finding that the statutes have like objectives is insufficient grounds for upholding the MMLA.

As stated by this Court in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963):

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives . . . A holding of federal exclusion of state law is inescapable

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5844, slip op. at 12 (9th Cir. April 16, 1985). The Ninth Circuit's decision, however, is in conflict with the plain language of the Pregnancy Discrimination Act as supported by the legislative history of the Act. Indeed, the Ninth Circuit's opinion does not discuss the legislative history discussed herein.

> and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . .

373 U.S. at 142.

In the instant case, the conflict between the federal and the state law may be irreconcilable. It may be impossible for an employer to grant preferential treatment to women disabled by pregnancy, as mandated by the state law, and avoid Title VII liability unless it gives the same benefits to employees who are disabled for reasons other than pregnancy.[8] Because of the apparent conflicts between Title VII and state statutes which give preferences to pregnant employees which are not given to others who are similar in their inability to work, the questions raised herein over the validity of such statutes should be considered by the Court.

II. THE MONTANA SUPREME COURT'S RELIANCE UPON THE ADVERSE IMPACT THEORY IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE PURPOSES OF THE PREGNANCY DISCRIMINATION ACT.

The Montana Supreme Court's interpretation of Title VII law conflicts with the Title VII decisions of

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[8] There is no doubt that in enacting Title VII, Congress intended Title VII principles to prevail over conflicting state statutory requirements. Section 708 of Title VII speaks directly to this issue, providing that:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be unlawful employment practice under this title.*

42 U.S.C. § 2000e-7 (emphasis added).

this Court. The Montana Supreme Court, in considering this case, made the assumption that an employment policy which does not grant any disability leave to employees during their first year of employment has a disparate impact on women. (A. 3b, 20b). Then, without affording the employer an opportunity to rebut the assumed disparate impact by showing that its policy does not have a disparate impact on women or by showing a business necessity for the employment policy, the Montana Supreme Court found the Appellant to be in violation of Title VII. Furthermore, the court used this finding as a basis for holding that the state statute was not in violation of Title VII. This convoluted reasoning should not be affirmed by this Court.

The adverse or disparate impact method of proof under Title VII is used to attack employment selection criteria which are facially neutral yet fall more harshly on a protected class of employees. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). To establish a prima facie case of disparate impact, a plaintiff must show that a facially neutral employment practice produces a significant adverse impact on a protected group of employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). There must be some statistical or actual data showing that a disparate impact has occurred. As the Fifth Circuit stated in *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750 (5th Cir. 1981), "In making a prima facie case in a disparate impact suit, however, the plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue." 657 F.2d at 753.

In the pregnancy context, the U.S. District Court for the Eastern District of Missouri in *Marafino v.*

St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cir. 1983) noted:

> The Court realizes that women are subject to most of the same types of illness and to the necessity for most of the same types of surgery that men are. Women are subject to the additional occasional physical condition of pregnancy and to the resulting event of childbirth. It might be presumed that those two facts together establish that women, more often than men, are in a position to know that they will require leave of absence from work, for physical reasons, at a fairly definite future time. However, the Court cannot simply imagine a disparate impact. *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 414, 11 FEP Cases 1074 (8th Cir. 1975). In the total absence of any evidence that women do in fact request lengthy leaves of absence more frequently than men, the Court cannot conclude that disparate impact has been shown.

537 F. Supp. at 213.[9]

In the present case, the Montana Supreme Court ruled that, "[a]n employer's no-leave policy therefore poses a drastic effect on women employees of childbearing age, an impact no male would ever encounter." [10] The Montana Supreme Court made this find-

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[9] In *Abraham v. Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981), the District of Columbia Court of Appeals also assumed that a neutral employment policy failing to grant an adequate leave policy had a disparate impact on pregnant women. Amicus curiae asserts, however, that such an assumption is improper.

[10] (A. 19b.)

ing absent any evidence whatsoever of the impact of Miller-Wohl's employment policy. No evidence was introduced showing how many persons lost their jobs as a result of Miller-Wohl's policy of prohibiting medical-related leave during the first year of employment; no evidence was introduced showing how many of the persons who lost their jobs were pregnant women, non-pregnant women, or men; and no evidence was introduced showing whether, at a statistical significance, there was a disparate impact on one sex or the other.

Consequently, the Montana court's finding of disparate impact was based upon assumptions that were unsupported by any probative evidence. The court's assumption of disparate impact was improper absent any evidence to that fact. The Montana Supreme court compounded its error by then finding that the Appellant violated Title VII without affording the Appellant any opportunity to rebut the disparate impact finding or to show a business necessity for implementing the leave policy. Consequently, the Montana Supreme Court's holding should not be summarily affirmed.

As discussed above, moreover, the Pregnancy Disability Act was enacted to assure the equal treatment of pregnancy-related and other disabilities. But Congress made it clear that one type of disability was not to be singled out for special treatment over others as long as individuals were treated the same with respect to their "inability to work." The fact that an evenhanded policy may have different results for groups having varying disabilities is not the type of "adverse impact" for which the Pregnancy Disability Act permits a remedy.

A similar construction was given by the Court to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in a case rejecting an argument that a state government's reduction of hospital care provided by Medicaid has an impermissible adverse impact on handicapped persons. In *Alexander v. Choate*, —— U.S. ——, 105 S. Ct. 712 (1985), the Court stated:

> Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, i.e., those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. . . . Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed. Ibid.

105 S. Ct. at 722.

Like 504, Title VII was enacted to ensure evenhanded treatment and opportunity for all persons; however, it was not enacted to be a guarantee that all persons would obtain equal results. To conclude otherwise would be to find that Title VII provides employees with a certain disability, pregnancy, more protection than other disabilities, a result clearly contrary to the PDA's legislative history. Accordingly,

the Montana Supreme Court's improper reliance upon the adverse impact method of analysis should be reviewed by this Court.

CONCLUSION

For these reasons, it is respectfully requested that the Court note probable jurisdiction of this appeal and grant further briefing and oral argument to develop the questions presented.

Respectfully submitted,

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